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No. 80-518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., *Et Al., Petitioners,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *Et Al., Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF OF RALPH RILEY, RESPONDENT

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QUESTIONS PRESENTED

1. Whether the presumption of Section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 920 (a), "that the claim comes within the provisions of this Act," requires an employer to adduce evidence showing the absence of a causal relationship between the worker's disabling condition and his employment.

2. Whether an employer can overcome the presumption of employment-relatedness of a worker's disabling condition by evidence that an alleged specific accident while at work did not occur, without addressing with substantial evidence, the relationship between the condition and the general activities of the employment.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. C 3a-11a) is reported at 627 F.2d 455. The opinion of the Benefits Review Board (Pet. App. D 12a-18a) is reported at 9 B.R.B.S. 936. The opinion of the Administrative Law Judge (Pet. App. E 19a-26a) is not reported.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 22, 1980. A petition for rehearing was denied on July 3, 1980 (Pet. App. A 1a-2a). The petition for writ of *certiorari* was filed on September 30, 1980, and was granted on March 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Code, Title 33:

§902. Definitions

When used in this chapter—

* * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * *

§903. Coverage

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury . . .

* * *

§920. Presumption

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

March 4, 1927, c.509, §20, 44 Stat.1124

§921. Review of Compensation Order

* * *

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified . . .

United States Code, Title 28:

§1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

District of Columbia Code:

§36-501. Longshoremen's and Harbor Workers' Compensation Act Made Applicable to the District of Columbia.

The provisions of chapter 18 of title 33 U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

COUNTERSTATEMENT OF THE CASE

Respondent Ralph Riley worked as a sheet metal worker for thirty-two years (Pet. App. D 12a). On November 19, 1975, while in the employment of U.S. Industries, Riley was working at Walter Reed Hospital hoisting duct work into ceiling trapeze hangers. Riley was working with another sheet metal worker, Howard Sutherland, on a two-tiered scaffold. When the work day was nearly ended and most of the workmen had left, Riley attempted to raise himself to the second level of scaffolding in order to adjust the duct work he and Sutherland were lifting into place (J.A. 21, 22). Riley testified that as he ascended to the higher level, which afforded little room to maneuver (J.A. 9), he hit his neck and shoulders on the overhanging duct work (J.A. 8-10, 15, 21-22). Sutherland, the only eyewitness to the accident, corroborated Riley's account of the accident (J.A. 6-20).

The injury was painful, and Riley immediately took Indocin, a medication that he carried with him for arthritis. Having rested for a short period of time, he left the job site for home. Riley went to bed early because of the pain but awoke about 2:30 a.m. in extremely severe discomfort. Riley awakened his wife and she drove him to the emergency room of La Plata Hospital (J.A. 25, 26).

The initial concern of the attending physician was that Riley was suffering from a heart ailment. While Riley was rushed off for a cardiogram and placed in intensive care, his wife gave his medical history as best she could (J.A. 26). The hospital monitored Riley for three days in an effort to determine the cause of his pain (J.A. 27).

On the fourth day, November 23, 1975, Riley was examined by Doctor Guillermo Sanchez who was eventually able to diagnose Riley's pain as an arthritic neck condition rather than a heart problem (J.A. 83-85, 157). Although Doctor Sanchez's medical history does not mention the accident, Riley testified that he told Doctor Sanchez about the incident (J.A. 44). Furthermore, there is no question that on the first day he returned to work, November 26, 1975, Sutherland reported that Riley's condition was work-related. Sutherland testified that at his first opportunity he "told the guys at work that Mr. Riley had struck his neck and shoulders on the duct" (J.A. 11). This testimony was corroborated by John Fury, the foreman, although he could only vaguely remember Sutherland saying that Riley was hurt on the job (J.A. 11, 77, 78).

Following his discharge from the hospital,* Riley saw Doctor Herbert Wisotsky on December 5, 1975.

* It is undisputed that since that hospitalization Riley has been permanently and totally disabled from employment.

Doctor Wisotsky stated that he obtained only a very brief history from Riley at that time. However, Doctor Wisotsky remembered that Riley had related that his injury and hospitalization had been due to an accident at work (J.A. 127, 128). This testimony comports with Riley's statement that he told Doctor Wisotsky about the November 19 accident during his December 5 office visit. (J.A. 57).

In late November or early December, Riley received a phone call from James A. Bettis, an agent for the union of which Riley was a member. Mr.Bettis was calling on behalf of Blackie Brandsfield, the employer's general superintendent, to find out when Riley was returning to work (J.A. 70, 71). Riley was surprised to discover that his employer had taken no action to compensate him for his injury (J.A. 54). Riley informed Bettis he was still receiving medical care and inquired as to the proper insurance carrier to contact. Somewhat later, in mid-December, Riley called James Killeen, another union agent, to inquire further about receiving compensation. Both Bettis and Killeen corroborated the content of these conversations (J.A. 54, 55, 70-75).

When the claimant heard nothing further concerning his compensation request, he sought the advice of an attorney. As a result, a claim form was filed December 29, 1975. Petitioner controverted the claim for compensation under the Act. Following a hearing on the merits, the Administrative Law Judge (hereinafter referred to as ALJ) determined that Riley had not reported the accident to his treating physicians or his employer until after his hospitalization; that Riley and Sutherland had fabricated the story of the accident; and that no such incident had occurred (Pet. App. E, 25a). Without further discussion of Riley's cervical osteoarthritis, the ALJ denied his claim for compensation (Pet. App. E 19a-26a).

Riley appealed to the Benefits Review Board, which affirmed by a two-to-one vote. The Board majority concluded that the ALJ's finding that the alleged accident had not occurred had a reasonable basis in the record (Pet. App. D 12a-16a). Board Member Miller dissented on the ground that "the real issue in this case is not whether claimant sustained an accident at work but whether claimant's injury is causally related to his employment" (*id.* at 17a-18a). Member Miller reasoned that because the ALJ incorrectly focused his attention exclusively on whether the claimant had sustained a particular accident, his decision contained no analysis or findings as to whether the employer had presented sufficient evidence to rebut the presumption contained in Section 20(a) "that the claim comes within the provision of the Act" (*id.* at 18a). Accordingly, he would have remanded the case to the ALJ for further findings (*id.* at 18a).

The claimant filed a petition for review of the Benefits Review Board's decision in the Court of Appeals, and the Director, Office of Workers' Compensation Programs intervened in support of his position. The Court of Appeals reversed the Board's decision and remanded for further proceedings (Pet. App. C 3a-11a). The Court did not question the ALJ's finding that the alleged accident had not occurred. It held instead that the injuries suffered by the claimant [his arthritic neck condition and its sudden exacerbation] might nevertheless have been 'employment-bred' and that the claimant was entitled, by virtue of Section 20(a) of the Act 33 U.S.C. 920(a), to the rebuttable presumption that they were (Pet. App. 10a). Because the ALJ focused exclusively on the occurrence of the alleged accident, however, he had not made the necessary findings.

Accordingly, the Court remanded the case for further consideration, without "anticipat[ing] what these findings will be" (*id.* at 11a).

ARGUMENT

I. The Presumption Of Section 20(a) Of The Longshoremen's Act Applies To The Employment-Relatedness Of The Claimant's Disabling Condition.

A. Statutory framework

The "coverage" provision of the Longshoremen's Act, Section 3(a), 33 U.S.C. 903(a), requires the payment of compensation for "disability or death of an employee, . . . if the disability or death results from an injury. . . .[1] The term "injury," by its definition in Section 2(2) of the Act, 33 U.S.C. 902(2), constitutes the general "employment-relatedness" requirement for compensability, common to all workers' compensation statutes in the same or similar terms. See, generally, 1 A. Larson, *The Law of Workmen's Compensation* §§6.00, 6.10 (1978; 1A *id.* §29(1979)).

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[1] For purposes of the Longshoremen's Act itself, the term "employee" in Section 3(a) is defined by Section 2(3), 33 U.S.C. 902(3), to include only persons "engaged in maritime employment" subject to certain exceptions. Further, Section 2(a) goes on to require that the "injury" "occurr[ed] upon the navigable waters of the United States (including [adjoining land areas used in maritime operations])." (See, generally, *P.C. Pfeiffer Co.* v. *Ford,* 444 U.S. 69 (1979); *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249 (1977). These criteria of coverage, known as the "status" and "situs" requirements respectively, are inapplicable to claims brought under the statutory extensions of the Act, such as respondent Riley's under the District of Columbia Worker's Compensation Act (see, *Travelers Ins. Co.* v. *Cardillo,* 141 F.2d 362 (D.C. Cir. 1944)), and are not involved in this case.

It encompasses an "accidental injury *** arising out of and in the course of employment, and such occupational disease *** as arises naturally out of [the] employment ***." Section 2(2).[2]

The presumption in Section 20(a) of the Longshoremen's Act, "[t]hat the claim comes within the provisions of th[e] Act," applies to the question whether the claim satisfies the general compensability requirements of the Act. The other presumptions, Section 20(b), (c), (d), 33 U.S.C. 920(b), (c), (d), relate to affirmative defenses available to the employer under Section 12, 33 U.S.C. 912 (lack of prompt notice of the injury to, or knowledge of it by, the employer) and Section 3(b), 33 U.S.C. 903(b) (causation of the injury by intoxication or by willful intention of the employee). So far as relevant to the present case, Section 20(a) encompasses the general "injury" requirement, that the disabling condition be employment-related. No basis in law exists for petitioner's assertion that Section 20(a) applies only to the "arising out of employment" requirement in cases where the claimant has already established that the injury occurred "in the course of employment."[3]

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[2] Petitioner asserts that the statutory terms "arising out of and in the course of", form a two-prong test, both elements of which must be met to establish entitlement to compensation (Pet. Br. 13). On the contrary, this interpretation ignores the historical construction of these statutory words. The two-prong test has been described as dicta and treated as such. *Ward and Gow* v. *Krinsky*, 259 U.S. 503 (1922).

[3] Petitioner would extend the presumption only to those claimants who have no need of it. Moreover, as the court in *Swinton* v. *J. Frank Kelly Inc.*, 554 F.2d 1075 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976) said: "The statutory presumption applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." 554 F.2d

B. Established construction of the provision adopted by Congress

The law enacted by Congress in 1927[4] drew heavily on the substantive and procedural provisions of New York's workers' compensation law. See *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 205 (1949). See *Wynn* v. *Kelly*, 223 F. Supp. 873 (D.D.C. 1973). New York decisions construing the language which later became Section 20(a) of the Act show that this provision governed not only questions of statutory applicability, but also the general compensability requirement of employment-relatedness.

The presumption of Section 21(1) of the New York Workmen's Compensation Law, enacted in 1914,[5] is identical to Longshoremen's Act Section 20(a). Its initial application was to whether the injured worker's employment was within the law's coverage — "hazardous employments" as enumerated in Section 3(1) of the law. See, *McQueeney* v. *Sutphen & Hyer*, 167 App. Div. 528, 153 N.Y. Supp. 554 (1915); *Kobyra* v. *Adams*, 176 App. Div. 43, 162 N.Y. Supp. 269 (1916). But it was very early applied also to the question whether injuries were "accidental" and "arising out of and in the course of employment," within the law's definition of "injury," Section 2(7). See, *Powley* v. *Vivian & Co.*, 169 App. Div. 170, 154 N.Y. Supp. 426, 431 (1915); *Fleming* v. *Robert Gair Co.*, 176 App. Div. 23, 162 N.Y. Supp. 298 (1916) (occurrence of alleged accident in course of work and causal relationship to proven hernia presumed). The New York Court of Appeals itself cited the Section 21(1)

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at 1082. See also, *Wheatley* v. *Adler*, 407 F.2d 207 (D.C. Cir. 1968).

[4] Act of March 4, 1927, c. 509, 44 Stat. 1424 (Longshoremen's and Harbor Worker's Compensation Act).

[5] N. Y. Laws 1914, c. 41, Sec. 21(1).

presumption, though it found that it had been overcome, in an early case involving an iceman's alleged injury that witnesses testified had not occurred. *Carroll* v. *Knickerbocker Ice Co.*, 218 N.Y. 435, 113 N.E. 507, 508 (1916). In *Collins* v. *Brooklyn Union Gas Co.*, 171 App. Div. 381, 156 N.Y. Supp. 957 (1916), however, the presumption was held applicable only to statutory coverage questions, not extending to the issue of occurrence of an employment-related accidental injury. *Collins* was later cited with apparent approval by the Court of Appeals in *Eldridge* v. *Endicott Johnson & Co.*, 228 N.Y. 21, 126 N.E. 254, 255 (1920), although the discussion is equally consistent with the view that the evidence overcame whatever effect the presumption had. Nevertheless, the compensation commission and courts continued to rely on the presumption on "injury" questions, particularly in cases in which the circumstances surrounding injuries and deaths could not be definitely ascertained, and the Court of Appeals affirmed. See, *Chludzinski* v. *Standard Oil Co.*, 176 App. Div. 87, 162 N.Y. Supp. 225 (1916), *Driscoll* v. *Gillen & Sons Lighterage,* 187 App. Div. 908, 173 N.Y. Supp. 825, *aff'd per curiam* 226 N.Y. 12, 123 N.E. 863 (1919); *Smith* v. *A.M. Oesterheld & Son,* 189 App. Div. 384, 179 N.Y. Supp. 10 (1919), *aff'd per curiam* 229 N.Y. 525, 129 N.E. 901 (1920); *Cirello* v. *Great Lakes Dredge & Dock Co.*, 231 N.Y. 556, 132 N.E. 886 (1921) (Per curiam). In *Norris* v. *New York Central R. Co.*, 246 N.Y. 307, 158 N.E. 879, 880-881 (1927), the Court of Appeals cited the discussion in *Smith* v. *A.M. Oesterheld & Son, supra,* which was in turn based on application of the presumption in *Driscoll, supra,* with full concurrence. While the *effect* of the presumption has varied somewhat in New York law, its *applicability* to the employment-relatedness question under the definition of "injury" has never been subject to much question.

C. Congressional understanding in enacting Section 20(a)

The scope of the application of the New York law's presumption was not addressed specifically in the hearings leading to enactment of the Longshoremen's Act in 1927, but the broad language and apparent effect of its adoption did not pass unnoticed.

While many objections to the bills's overall coverage were voiced throughout the many days of hearings, a shipyard representative, in protest of the bill's broad coverage described how the Section 20(a) presumption (a feature which was not then common among the existing state compensation acts) would be applied to a typical shipyard worker's injury under the proposed law—

> Here is a man who may work 90 percent of his time upon the construction of a ship on shore as a painter, we will say. Ten percent of his time he might work on the ship and he might become infected with lead poisoning. Now, out of the 90 percent of the time being on shore Virginia expressly excludes any compensation [for occupational disease], but for the 10 percent that he is working on the ship this bill — either the Senate bill or the House bill — would undertake to require us to give him a compensation for occupational disease.
>
> Now, I see there are presumptions [in Section 20]. I should have used that when discussing the question of occupational disease. [In Section 20] you have provided — I am telling you about the difficulty when you come to occupational diseases.
>
> This is the Senate bill. It is Section 20 of [S.] 3170. [Reading:]
>
> In any proceeding for the enforcement of a claim for compensation under this act it shall be presumed in the absence of substantial evidence to the con-

> trary, first, that the claim comes with the provisions of this act.
>
> Then it speaks about the sufficiency of notice and about intoxication. What I want to bring to your attention is ["] that the claim comes within the provisions of this Act.["] Just as soon as the man that I described, that had been working a few minutes on the boat, who had given all of this time practically to work on the shore, just as soon as he contracts any disease, he will claim that it comes under this act, and the presumption under this act is that it does shifting absolutely the burden of proof. The employer has to prove the negative; and for God's sake tell me how you are going to find out where a man contracted a disease. He can tell you he contracted it in painting some small part of the ship, and under that presumption how in the world are you going to defeat him? Hearing on S. 3170 before the House Judiciary Committee, 69th Cong. 1st Sess. 196, 198 (1926).[6]

Yet the bill was enacted without change in the relevant provision. The witness's testimony, which stood uncontradicted in its description of the presumption's effect, was unequivocally based on the understanding that Section 20(a) would apply to the question of the relationship between the covered employment (that aboard ship) and the disability.[7]

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[6] Statement made by E.M. Braxton, representing Newport Shipbuilding and Dry Dock Co., the largest employer of labor in the Commonwealth of Virginia. Petitioner and Amicus echo this philisophical concern, contending that the Court of Appeals' pronouncement in *Riley* has opened Pandora's Box so that even the common cold may now be compensable. As Mr. Braxton's testimony makes clear, this tidal wave was cited fifty-five years ago and has yet to reach shore (Petitioner's Br. 24, Amicus Br. 21-25).

[7] Amicus urges that the holding of the Court below is directly contrary to the Administrative Procedure Act, 5 U.S.C. § 556;

D. Judicial precedent under The Longshoremen's Act

This Court has never considered what questions in litigation are subject to the effect of the Section 20(a) presumption. It has, however, invoked the presumption several times. In *Davis* v. *Department of Labor and Industries of the State of Washington,* 317 U.S. 249 (1942), the Court described the presumption as one of "jurisdiction" under the Act, *i.e.*, statutory coverage of the circumstances of the injury, and indicated that it would support an award under the Act in the constitutional "twilight zone" in which the Act's coverage was a close question. 317 U.S. at 256. Again in *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), the Court described Section 20(a) as applying to the Act's "jurisdiction" of coverage, indicating that it "applies with equal force to proceedings under the District of Columbia Act." 330 U.S. at 474. Far from *limiting* the presumption's scope to coverage questions, the Court has also invoked it in support of an award where the sole question was the employment-relatedness of a worker's death. In *O'Keeffe* v. *Smith, Hinchman & Grylls Associates*, 380 U.S. 359 (1965), the contested issue was whether the worker's death met the Section 2(2) definition of "injury," *i.e.*, whether it "ar[ose] out of and in the course of employment." The Court quoted the Act's allocation of fact-finding authority to the deputy commissioners (now administrative law judges), its limitations on judical review, *and the Section 20(a) presumption*, and indicated that all three operate to "limit the scope of judicial review of the [factfinder's]

(Amicus Br. 23). The cited section states: "*Except as otherwise provided by statute,* the proponent of a rule or order has the burden of proof" (emphasis supplied). Implicit in the decision on appeal is an understanding that Congress had, in fact, "otherwise provided" when it drafted Section 20(a).

determination that a 'particular injury arose out of and in the course of employment.' " 380 U.S. at 361. Clearly the Court understood the presumption to apply to the question as to whether the disabling condition or death constituted an "injury" as defined in Section 2(2), rather than just to the *other* element of statutory "coverage" in Section 3(a).

Legislative history and precedent thus confirm that the presumption of Section 20(a) "that the claim comes within the provisions of this Act" was not intended to be, and never has been, limited in its effect to questions of statutory coverage of the type and place of employment involved. It applies as well to disputes about the employment-relatedness of the worker's disabling condition or death, *i.e.*, whether it constitutes an "injury" as defined in Section 2(2).[8] Despite scattered dicta to the contrary, the Courts of Appeals have recognized this proposition. See, *Swinton* v. *J. Frank Kelly, Inc.*, 554

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[8] Petitioner attaches much significance to *Eschbach* v. *Contractors Pacific Naval Air Bases*, 181 F.2d 860 (7th Cir. 1950), in which the 7th Circuit declined to extend the Section 20(a) presumption to the question of causality. However, the Circuit's interpretation of this provision is equivocal at best, for it was later to hold: "We begin with the proposition that where there is a doubtful factual question as to whether an injury arises out of employment, the law presumes compensability." *Continental Insurance Co.* v. *Byrne*, 471 F.2d 257 (7th Cir. 1972), *cert. denied*, 406 U.S. 918 (1972). Moreover, Petitioner and Amicus cite the Fourth Circuit decision in *Furlong* v. *O'Hearne* 144 F. Supp. 266 (D. Md. 1956), aff'd. 240 F.2d 958 (4th Cir. 1957). But it should be noted that the principle there is wholly inapposite to the instant case. While the District Court in *Furlong* held that the presumption in Section 20(a) does not relieve the claimant of the necessity of proving injury, this was dicta in light of the fact that the claimant introduced uncontradicted evidence of injury. On appeal, the lower court was affirmed in an opinion which did not address the presumption issue.

F.2d 1075, 1082 & n.34 (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976); *J.V. Vozzolo, Inc.* v. *Britton,* 377 F.2d 144, 149 (D.C. Cir. 1967); *Gardner* v. *Director, OWCP,* 640 F.2d 1385, 1388, 1391 (1st Cir. 1981); *John W. McGrath Corp.* v. *Hughes,* 264 F.2d 314, 314 (2d Cir.), *cert. denied,* 360 U.S. 931 (1959); *Marra Bros.* v. *Cardillo,* 154 F.2d 357, 359 (3d Cir. 1946); *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP (Jenkins),* 583 F.2d 1273, 1278-79, (4th Cir. 1978), *cert. denied,* 440 U.S. 915 (1979); *Eller & Co.* v. *Golden,* 620 F.2d 71, 73 (5th Cir. 1980); *Continental Insurance Co.* v. *Byrne,* 471 F.2d 257, 260-61 (7th Cir.), *cert. denied,* 406 U.S. 918 (1972); *Ridgley* v. *Ceres, Inc.,* 594 F.2d 1175, 1177 (8th Cir. 1979); *Parsons Corp.* v. *Director, OWCP,* 619 F.2d 38, 40-41 (9th Cir. 1980).[9] Petitioner suggests no basis in law or policy for disturbance of this settled view of the broad application of the Section 20(a) presumption to employment-relatedness issues.[10] The Court of Appeals' invocation of the presumption in Riley's aid on the question of the employment-relatedness of his disabling cervical-spine condition was proper.

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[9] Petitioner citing *Evening Star Newspaper Co.* v. *Kemp* 533 F.2d 1224, 1234 (D.C. Cir. 1976), perceives a contradiction within the District of Columbia Circuit on the presumption question. The language which petitioner so liberally quotes (a dissenting opinion) neither addresses the presumption nor represents the holding of the court (See Pet. Br. 20).

[10] Amicus opines that even without the expansion of the statutory presumption, the cost and impact of workers'compensation is profound (Amicus Br. 22-23). Amicus illustrates this contention with reference to fiscal woes suffered by the Washington Metropolitan Area Transit Authority (WMATA) as a result of compensation claims. It appears that WMATA has begun to solve the problem by being more mindful of safe working conditions (See Appendix A).

II. The Presumption Governs Where The Circumstances And Evidence Fairly Suggest An Inference That The Claimant's Disabling Condition Is Causally Related To His Or Her Employment.

Section 20(a) does not say what showing must be made by a compensation claimant in order to give rise to the presumption. Indeed, its introductory terms — "In *any proceeding* for the enforcement of a claim for compensation under this Act" (emphasis supplied) — suggests that it places the burden of coming forward with "substantial evidence," negating the compensability of the claim, on the employer at the outset. In practice, however, this suggestion is never acted upon; claimants come forward with their supporting evidence at the outset of formal hearings under the Act, although employers and their insurance carriers understand that they must come forward with evidence to overcome the effect of the presumption regardless of how weak the claimant's proof may be. Accordingly, there is very little precedent regarding what must be shown before it becomes incumbent on the employer to present "substantial evidence to the contrary" in order to avoid the controlling force of the presumption.

Whatever little judicial precedent exists, however, provides a perfectly adequate standard, which appears to be consistent with the decision below. In *Wheatley* v. *Adler*, 407 F.2d 307 (D.C. Cir. 1968) *en banc* the Court reasoned:

> The possibility that Wheatley's death was due to urinating-in-the-cold is not a mere fancy or wisp of "might have been" like the musing of the old judge in Whittier's poem who was enchanted by the sight of Maud Muller. It was volunteered by Dr. Thomas as a realistic possibility providing meaningful perspective for his opinion. This certainly sufficed, in

> the light of the statutory presumption, to require substantial evidence in refutation, at least to articulate that this possibility was improbable — if he could say that it was improbable.

407 F.2d at 313.

And in *Swinton* v. *J. Frank Kelly, Inc.* 554 F.2d 1075 (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976), the Court relied on *Wheatley's* reasoning:

> [T]he statutory presumption may be dispelled by circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event. It cannot be said, however, that the evidence in this case rose to that level. Here, as in *Wheatley,* no medical expert offered any opinion as to causality; no expert espoused a view that the back ailment was not bred or intensified by his fall. And surely the evidence, such as it was did not of its own force serve to disestablish the possible affinity of the two.
>
> The caliber of proof, if circumstantial, which the statutory presumption demanded is shaped in part by the fact that here, as in *Wheatley*, the thesis that Swinton's current affliction arose from the accident is "not a mere fancy or wisp of 'might have been.' "

554 F.2d at 1083.

The standard of *Wheatley* and *Swinton* may be taken to mean that "specific and comprehensive" evidence, sufficient to justify a finding adverse to the claimant with respect to a "potential connection" between the disabling condition and the employment, need only be produced by the employer with respect to a "potential connection" which is fairly inferable from, or suggested by, the record evidence. In practice, it makes little difference whether the presumption is regarded as

applicable to *any* potential causal link to the employment or only to such a connection that has some degree of record support as contemplated by *Wheatley* and *Swinton*. Where such support is lacking, certainly mere *general* negative evidence will suffice to rebut the presumption, whereas greater particularity can reasonably be required of the employer's evidence to the contrary where the record contains support for a particular theory of causal connection.

The Court of Appeals herein did not decide the degree of evidence necessary to require rebuttal, nor did it determine the requisite specificity of the rebuttal. Like the dissenting member of the Benefits Review Board, it found no need to address those issues because both the employer's evidence and the ALJ's findings concerned exclusively the question whether the alleged accident on November 19, 1975 had in fact occurred. The ALJ found that no such accident happened. That finding was a permissible inference from the employer's disputed evidence, which the ALJ credited, that neither Riley nor his co-worker had informed anyone of the accident until some days later, and the Court of Appeals afforded that finding the full deference to which it was entitled. Rather than impermissibly disturbing the ALJ's finding, the Court held that it was "not responsive to the issue properly presented for resolution" (Pet. App. 10a) — the more general question whether Riley's disabling condition of cervical arthritis is employment-related. On this question the employer presented no evidence whatsoever; the record may be searched in vain for any medical or other evidence indicating, specifically or even in the most general terms, that the condition was unrelated to Riley's work.

On the other hand, the "potential connection" between Riley's neck condition and his employment is suggested by the circumstances of the case. Riley was employed as a sheet metal worker for some thirty-two years (Pet. App. 13a).[11] The record contains several descriptions of the nature of his duties installing overhead sheet metal duct work; it is performed in large part from below (See, J.A. 6, 20, 21). Anyone who has ever spent five minutes painting a ceiling or replacing a light bulb in a ceiling fixture is familiar with the proposition that overhead work puts a strain on the neck. Of course the inference that thirty-two years of such work might cause, contribute to, aggravate, or accelerate the development of cervical osteoarthritis may well be medically unwarranted, and despite petitioner's failure to produce any evidence on the point, the Court of Appeals has extended the employer the opportunity to present such evidence on remand if it can.[12] But the possibility of such a relationship can fairly be inferred from the

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[11] Under the long-established "last employer" rule, the duration of the worker's tenure with the particular employer against whom the claim is filed is immaterial. If the employer is the last in whose employ the worker was subject to the conditions of employment that produced the occupational disease, it is liable in full for the disability caused by the disease. See, *General Dynamics Corp.* v. *Benefits Review Board,* 565 F.2d 208 (2d Cir. 1977). See, generally, 4 A. Larson, *The Law of Workmen's Compensation* §§ 95.11, .12, .21 (1979).

[12] Petitioner correctly described the question for the ALJ on remand in its Reply to the respondents' brief in opposition to the Petition for Certiorari:

> Upon remand the Administrative Law Judge is to decide now whether Riley's [condition] was precipitated or aggravated by the ordinary conditions of his employment as a sheet metal worker and to consider the applicability of the presumption of causal relationship as applied [sic] to the facts of this case.

Pet. Reply Br. at 9 (citation omitted).

nature of Riley's employment and his disabling condition. This realistic possibility is enough to require the employer to produce at least some "evidence to the contrary." Petitioner has not done so.

Even if such a lay inference of a causal relationship, based on common experience and the circumstances of the case, should be regarded as a less than compelling ground in itself for invocation of the Section 20(a) presumption, the Court of Appeals was correct in applying the presumption to the alternative potential connection on the record in this case. For the record contains the testimony of two medical witnesses, both of whom directly supported the proposition that the nature of Riley's duties, requiring "overhead type" exertion and "involv[ing] quite a bit of hyperextension of the neck," at least aggravated Riley's condition (J.A. 130, 158, 162). Yet the ALJ made no reference to this alternative potential causal link between Riley's condition and his employment.

Petitioner notes that Riley placed no positive reliance on an occupational-disease theory at the hearing before the ALJ. (Pet. Br. 11). This aspect of trial strategy resulted from full confidence that Riley's assertion of the occurrence of an accident on November 19, 1975 would be accepted. In any event, the absence of a clearer assertion of an occupational-disease theory at the first hearing would not preclude his presentation of such a theory at a new hearing even were this Court to reverse the Court of Appeals and reinstate the ALJ's original decision. By virtue of Section 22 of the Longshoremen's Act, 33 U.S.C. 922, determinations under the Act have only the most limited finality. On the assertion that the ALJ was mistaken in his determination that Riley's condition is not an "injury" within Section 2(2), Riley is en-

titled to reopen his claim and present new evidence, regardless of its availability at the time of the earlier hearing. *O'Keeffe* v. *Aerojet General Shipyards,* 404 U.S. 254 (1971). *Banks* v. *Chicago Grain Trimmers Ass'n,* 390 U.S. 459 (1968). Nothing precludes him from presenting even an entirely new theory in support of his claim in Section 22 modification proceedings. The Act contemplates such modifications; petitioner's assertion that the Court of Appeals was wrong to consider the potential work-relatedness of Riley's injury ignores this important right under the law. The ALJ's findings and discussion are, as the Court of Appeals reasoned, facially inadequate for resolution of the work-relatedness issue. The record is replete with evidence dispositive of the connection between the claimant's injury and the nature of his employment. That claimant did not rely expressly on the work-relatedness theory does not vitiate the ALJ's duty to answer the whole question before him — whether the claimant's disability was "caused by an injury" as defined in Section 2(2). As the Court of Appeals held, the ALJ's decision in this case stopped short of answering that question, and thereby erred in failing to accord the Section 20(a) presumption its appropriate role.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

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Metro Work Mishaps Cut, Cash Saved

Strong Safety Effort Produces Dividends

By Thomas Crosby
and Elissa Cottle
Washington Star Staff Writers

Metro has been saving millions of dollars through an aggressive safety program that has dramatically reduced the number of accidents on Metrorail construction sites while also reducing insurance costs.

The program has been so successful that Metro officials last week disclosed that they expect to save an estimated $8.3 million in insurance costs for construction next fiscal year.

At one time, construction on the 101-mile Metrorail system was considered one of the most dangerous jobs in the nation, but the transit agency's safety awareness program has cut accidents almost in half, said Don Bunn, a Metro insurance analyst.

Because Metro construction is resulting in fewer accidents, competition has begun for the first time in years among insurance companies vying for the Metro insurance contract. Last year, that contract cost Metro $30 million; next year it will be only $21.7 million.

The brainchild of John S. Egbert, Metro's assistant general manager for design and construction, the safety program was started in June 1978 with cash awards to firms that complete a project with an accident rate below Metro's average for that type of work.

"If a contractor does a typical job, he breaks even," said David Shilling, a project monitor for the $21 million tunneling for the Forest Glen Metrorail station. "If he does lousy, he pays the transit authority and if he does good, he gets a bonus."

Currently, 41 of the 50 Metrorail construction firms are in the program (the other nine began work before the program started).

For example, Metro's average accident rate for tunneling projects is 9.7. The rate is determined by taking the number of lost work days, multiplying it by 200,000 and dividing by the number of man hours worked.

Peter Kiewit and Sons Co., which is boring the hard rock tunnel for Forest Glen, gets $14,000 from Metro for every one-tenth of a percentage point on its safety rate below 9.7. If Kiewit's record is 9.5 when the firm completes work in October, it will receive $28,000 from Metro.

So far, however, the firm has put in 350,000 working hours without a single injury, said Shilling, and may be able to collect as much as $280,000 when the job is done — the maximum Metro agreed to pay for a safe construction job.

"I think it's a good program," said Shilling. "It gives a contractor incentive to do a good job."

During the first several years of Metrorail construction, the transit agency's accident rate exceeded the national average because Metro paid insurance claims and it made no financial difference to contractors if they had a bad safety record.

The attitude among many contractors was "If you're not paying the bill what difference does it make?" said Shilling.

In 1979, Metro paid $38.1 million for construction insurance but for the last three years the safety program has been saving the transit agency about $7 million a year, said Delmar Ison, Metro's insurance director.

"In 1977 we woke up to the fact that we had to get these high-level benefits (for injured workers) under control," said Ison, who added that awareness of safety has permeated the entire construction hierarchy, from the workers to the company owners.

With fewer workers being injured, Metro has to pay fewer Workmen's Compensation claims. In the District, Workmen's Compensation claims are the second highest in the nation (Alaska is higher), but with fewer claims being made, insurance companies are willing to reduce their premiums to insure the approximately 6,000 workmen building the subway.